STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH KLOBERDANZ, Next Friend of JEFFREY KLOBERDANZ, a Minor,

Plaintiff-Appellant,

v

SWAN VALLEY SCHOOL DISTRICT,

Defendant-Appellee.

UNPUBLISHED
January 31, 2006

No. 256208
Saginaw Circuit Court
LC No. 03-047994-CZ

Before: Kelly, P.J., and Meter and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant under MCR 2.116(C)(10). This case arises out of defendant's decision to issue a short-term suspension to plaintiff's son, Jeffrey Kloberdanz,[1] based on a gesture he made at his high school. We affirm.

On the day of the incident underlying this case, the high school counselor was giving a presentation to plaintiff's Language Arts class. According to plaintiff, while the counselor was addressing a question from another student, plaintiff looked at his friend and, to indicate his boredom, made a gesture as if he were shooting himself in the mouth. However, the counselor perceived the gesture differently and believed that plaintiff was making a sexual gesture about her. Plaintiff was subsequently suspended for the remainder of the school week.

Plaintiff alleges that defendant lacked competent, material, and substantial evidence to support its finding that plaintiff made a sexual gesture that referred to the counselor. We first note, because the briefs indicate some confusion on this issue, that whether there was competent, material, and substantial evidence supporting defendant's decision is not a question of fact reserved for a jury or other factfinder. Indeed, the factual findings in this case were already made by defendant, and the courts of this state are not permitted to make new factual findings. See *Birdsey v Grand Blanc Community Schools*, 130 Mich App 718, 723-724; 344 NW2d 342

[1] Because Jeffrey is the real plaintiff in interest, we will hereafter refer to him as plaintiff.

(1983). Instead, we must only determine the legal question of whether defendant's factual findings were supported by competent, material, and substantial evidence. *Id.*

Competent and material evidence is evidence that is admissible and relevant. *McBride v Pontiac School Dist* (*On Remand*), 218 Mich App 113, 122; 553 NW2d 646 (1996). Judicial review for "substantial evidence" requires review of the whole record, and while this review is not de novo, "it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency." *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974). While conducting this qualitative and quantitative evaluation, a reviewing court must "not invade the province of exclusive administrative fact-finding by displacing an agency's choice *between two reasonably differing views*." *Id*. (emphasis added).

Moreover, this court gives deference to an agency when reviewing that agency's decision for substantial evidence:

> '[S]ubstantial evidence' is that which a reasonable mind would accept as adequate to support a decision. Substantial evidence is more than a mere scintilla but less than a preponderance of evidence. Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn. [*McBride, supra* at 123 (internal citations omitted).]

In this case, the district superintendent, as the final arbiter of the facts underlying plaintiff's suspension, determined that plaintiff made a sexual gesture concerning the counselor. He conducted individual interviews with all who saw the gesture: plaintiff, the counselor, and plaintiff's friend. Faced with conflicting accounts of the gesture from plaintiff and his friend, on one hand, and the counselor, on the other hand, the superintendent testified that he based his conclusion on the counselor's perception of the gesture, apparently deciding that the counselor was more reliable than plaintiff and his friend. Based on the record, we have no reason to doubt the superintendent's view of the counselor's reliability. In the counselor's written report and subsequent deposition, she described the sexual gesture in detail.[2] While there was evidence – namely, statements by plaintiff and his friend – to support plaintiff's story that the gesture was not sexual, it is not this court's duty to displace the superintendent's choice between two reasonably differing views of the evidence. See *McBride, supra* at 123, and *Detroit Symphony*

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[2] In her report made on May 1, 2002, the counselor described plaintiff as looking at his friend and then inserting his two fingers slowly into and then out of his mouth. The counselor stated her belief that the gesture was sexual and indicated that she was embarrassed by it. In her deposition on August 20, 2003, the counselor described how plaintiff looked at her and then slowly inserted his fingers into his mouth as he looked at his friend.

Orchestra, *supra* at 124. Thus, we conclude that the superintendent's finding that plaintiff made a sexual gesture concerning the counselor was supported by competent, material, and substantial evidence.

The law as set forth in Birdsey supports our conclusion. In *Birdsey*, the school expelled plaintiff for possessing and attempting to sell marijuana at school. *Birdsey*, *supra* at 720. This Court found that there was competent, material, and substantial evidence supporting the defendant's finding that the plaintiff possessed and attempted to sell marijuana based on the plaintiff's repeated admissions. *Id*. at 724. In reaching its holding, the court adopted the rationale of *Wood v Strickland*, 420 US 308; 95 S Ct 992; 43 L Ed 2d 214, abrogated on other grounds by *Harlow v Fitzgerald*, 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982), which binds a court to "a school administration's factual findings where there is any evidence in the record to support them." *Birdsey*, *supra* at 723-724. Plaintiff attempts to distinguish *Birdsey* from this case on the grounds that *Birdsey* involved a student who admitted to committing the charged infraction. However, this distinction overlooks the general holding of *Birdsey*, which is that an administration's factual findings must be upheld if there is substantial evidence to support the findings. In this case, while plaintiff did not admit to making a sexual gesture, the counselor's statement supported the factual finding of the superintendent.

Plaintiff further asserts that defendant abused its discretion by suspending him because his behavior did not constitute a gross misdemeanor under MCL 380.1311(1). We disagree.

MCL 380.1311(1) states:

> Subject to subsection (2) [concerning possession of dangerous weapons], the school board, or the school district superintendent, a school building principal, or another school district official if designated by the school board, may authorize or order the suspension or expulsion from school of a pupil guilty of gross misdemeanor or persistent disobedience if, in the judgment of the school board or its designee, as applicable, the interest of the school is served by the authorization or order.

In *Holman v Trustees of School Dist No Five, Twp of Avon*, 77 Mich 605, 608-609; 43 NW 996 (1889), our Supreme Court held, in reviewing Section 5069 of Howell's Annotated Statutes, a predecessor to MCL 380.1311(1),[3] that "gross misdemeanor" means gross misbehavior or

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[3] The pertinent statute read:

> '"[T]he district board shall have the general care of the school, and shall make and enforce suitable rules and regulations for its government and management, and for the preservation of the property of the district. Said board may authorize or order the suspension or expulsion from the school, whenever, in its judgment, the interests of the school demand, of any pupil *guilty of gross misdemeanor or*

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misconduct. The Court further stated that before a pupil can be expelled or suspended from school,

> he must be guilty of some willful or malicious act of detriment to the school, and the misconduct must be gross, - something more than a petty or trivial offense against the rules, - or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school. [*Holman*, *supra* at 609.]

In this case, plaintiff was suspended for indecency under the Swan Valley High School Student Handbook. The handbook defines indecent acts as "offensive acts, which include acts of immoral conduct against commonly recognized standards of property [sic] or good taste as interpreted by the administration and teaching staff." We note that within the broad category of acts one might reasonably consider offensive to good taste, there will be many trivial offenses that would not rise to the level of a gross misdemeanor under *Holman*. *Holman*, *supra* at 608-609.

However, in this case, plaintiff's gesture rose to the level of gross misbehavior and misconduct. As explained above, the superintendent – based on competent, material, and substantial evidence – concluded that plaintiff made a willful and malicious gesture of a sexual nature, warranting a suspension. While only the counselor, plaintiff, and plaintiff's friend saw the gesture, the act still posed a detriment to the school. Allowing a student to go unpunished for embarrassing and denigrating a school employee only welcomes more acts of disrespect. A school clearly has a duty and a right to protect its basic educational mission and promote mature conduct by prohibiting vulgar and lewd conduct. Accordingly, we find that defendant did not abuse its discretion under MCL 380.1311(1) by suspending plaintiff.

Finally, plaintiff asserts that the trial court erred by granting summary disposition to defendant on the claim that defendant denied plaintiff due process of law. We disagree. We review de novo a trial court's ruling with regard to a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

In *Goss v Lopez*, 419 US 565, 581; 95 S Ct 729; 42 L Ed 2d 725 (1975), the United States Supreme Court set forth the general due process requirements applicable to short-term suspensions. The Court stated that "due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against him and, if he

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> *persistent disobedience*."' [*Holman*, *supra* at 608, quoting How. Stat. § 5069 (emphasis in *Holman*)].

denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.*; see also *Birdsey, supra* at 725.

In this case, plaintiff suggests that, because the assistant principal based his initial questioning on an incorrect assertion of the charge made against plaintiff and because plaintiff was not permitted to cross-examine the counselor, plaintiff was denied procedural due process. Plaintiff argues that, because he was misled about the charge made against him, his initial denials were misconstrued and used against him to suggest that his story changed over time, when in fact he consistently stated that he had not directed a sexual gesture at the counselor. Plaintiff asserts that this initial confusion was compounded by the fact that he was not immediately permitted to question the counselor about what she had seen and that it was not until after he had already been suspended, when his parents learned that he had been looking at his friend and not the counselor when the gesture was made, that plaintiff realized which of his gestures had been misconstrued.

We agree with the trial court's concerns about the way defendant conducted its investigation, but we also conclude that the trial court correctly found that defendant complied with the rudimentary requirements of due process. Defendant gave plaintiff oral notice of the general nature of the charge against him, and although the assistant principal's description of the charge may have varied from the counselor's, plaintiff had the opportunity to deny that he made a sexual gesture referring to the counselor, and he did so. We do not think that plaintiff's failure, at the initial hearing, to connect the assistant principal's description of the gesture with the innocent gesture plaintiff claims to have made indicates that defendant denied plaintiff an opportunity to be heard on the matter. It also appears from the record that the evidence supporting the charge, i.e., the counselor's perception of what she saw, was explained to plaintiff. Further, all of these events occurred before plaintiff's suspension. See *Goss, supra* at 582. In addition, after defendant imposed the suspension, defendant afforded plaintiff the opportunity to appeal his suspension to the superintendent, before whom plaintiff was able to present of his version of the event.

Moreover, we do not believe that plaintiff was entitled to cross-examine the counselor. On this subject, *Goss* states as follows:

> We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. [*Goss, supra* at 583.]

While the requirements of procedural due process are not by their nature fixed, *id*. at 577-578, and permitting plaintiff to question the counselor early on in this process may have prevented much of the confusion in this case about what actually occurred, this case did not present an "unusual situation" in which more than rudimentary procedures were required. *Id*. at 584; see also *Newsome v Batavia Local School Dist*, 842 F2d 920, 925-926 (CA 6, 1988). This case is distinguishable from *Dillon v Pulaski Co Special School Dist*, 594 F2d 699, 700 (CA 8, 1979), on which plaintiff relies, in that plaintiff was not expelled. As *Goss* noted, "[l]onger suspensions

or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Goss*, *supra* at 584.

In addition, despite any inadequacy in the following of the notice procedures set forth in the student handbook, plaintiff and his parents were sufficiently apprised of the allegations and consequences such that the actual procedures comported with the requirements of the handbook and due process. See *Davis v Ann Arbor Public Schools*, 313 F Supp 1217, 1226-1227 (ED Mich, 1970) (concluding that a lack of written notice as required by a student handbook was not an error of constitutional significance when the plaintiff was aware of the reasons for his suspension).

Accordingly, even viewing the facts in the light most favorable to plaintiff, we conclude that defendant did not deprive plaintiff of his right to procedural due process, and the trial court correctly granted summary disposition with respect to this issue.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter